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IV

COURT ORGANIZATION IN RELATION TO CONTENTIOUS AND NONCONTENTIOUS BUSINESS

In any matured system of law the administration of a decedent's estate may involve both contentious and noncontentious matters. Thus, first, it is entirely possible that all interested parties are agreed that a will is valid, or that there is no will and that the property should be distributed to creditors and to devisees or heirs on some fair basis. Or, second, there may be a dispute as to whether the will propounded is valid; there may be adverse claims to the office of executor or administrator; a creditor's claim may be disputed by an executor or administrator; a dispute may arise as to priorities in the payment of legacies when the estate is insufficient to satisfy all. As to this second type of administrative matter, it is difficult to escape the conclusion that it involves the judicial determination of controversies of the same general character as are handled by the civil side of a trial court of general jurisdiction. It calls for the same capacity to supervise impartially the trial of contested issues, the same ability to determine accurately the application of complicated rules of law to the transmission of property interests. In short, it would seem that the contentious business of the court should be handled by a judge with as high qualifications as the trial judge.

As to noncontentious matters, the situation may be different. Here it is conceivable that the estate could be distributed without any judicial intervention at all. Indeed, the Roman law system, with its conception of universal succession,[245] accomplished just that. And the modern

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[245] BUCKLAND, TEXTBOOK OF ROMAN LAW, 2d ed., 282 ff. (1932).

tendency of legislation in the United States to dispense entirely with administration in the case of small estates is to the same effect.[246] Nevertheless, there are many cases where some judicial action is desirable even though there are no controversies among the interested parties. This becomes particularly important in view of the current trend, elsewhere noted,[247] to provide that the probate court distribute land by its decree. In spite of the lack of disagreement among persons interested in the estate, they may well need the aid of a court to determine what *is* a just basis of distribution; they may wish to distribute in such a way as to avoid disputes in the future; and, to further that end, they may desire to have an official record of the distribution which has been made. Thus, the noncontentious business of the court is an important function of the judicial organization. No statistics are required to justify the observation that the vast majority of smaller estates is handled by American probate courts without any controversies whatever. Administration in court is then desired solely for the purpose of having the property of the decedent disposed of in an orderly way.

As to the noncontentious business of the court, it is not so clear that an efficient trial judge is needed. Certainly, by hypothesis, there are no disputed issues to try. And much of the noncontentious business is mere routine which can well be handled by a superior type of clerk or probate register. Of course, insofar as the action of the court in noncontentious business involves the avoiding of potential disputes, it would seem to call for the same understanding of the intricacies of property law as is necessary when there is an actual dispute.

It is the purpose of the discussion which follows to consider how far the court organization in typical jurisdictions is adapted to a differentiation between contentious and noncontentious business. The sharp differentiation in English law will first be pointed out. Then the probate judicial organizations of various typical states will be considered in connection with the questions: How far have they retained the distinction between contentious and noncontentious business emphasized in the English system which served as their model? How far have they developed a basis of differentiation unlike the English model? The answer to these questions will involve some consideration of the matter of will contests and of appeals by trial de novo in the court of general jurisdiction. But it must be pointed out that the

[246] See ATKINSON, WILLS AND ADMINISTRATION 529-540 (1937).

[247] See Subdivision V of this monograph.

handling of contentious and noncontentious business is under consideration here only as a matter of court organization and not as a matter of probate procedure.

In the English ecclesiastical courts, the line between contentious and noncontentious business was pretty much the line between probate in common and in solemn form, heretofore referred to. If a will were probated in common form there was no notice to interested parties; proof generally consisted merely in the executor taking oath that he believed the instrument presented was duly executed by a competent testator. If a caveat were filed by the next of kin, proof in solemn form then had to be made; interested parties were cited; and the attesting witnesses testified as to the execution of the will. The hearing was before the ordinary. Contested issues as to the account of the personal representative and as to a legatee's right to his legacy could also be tried in the ecclesiastical courts. As to the real estate, noncontentious business would seem to have been handled without any judicial assistance whatever; and contentious matters were dealt with either in the courts of law or of equity, depending upon the nature of the controversy.

Doubtless the distinction between the probate of a will in solemn form and in common form was not developed primarily for the purpose of judicial efficiency. One reason for it must have been the belief that the decedent's estate required management from the moment of his death; and that to wait for notice before the appointment of an executor or administrator would result in a wasting of the property of the decedent. This idea is voiced in the *Report of the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts*, which appeared in 1832.[248] Concluding that the probate in common form should be retained, the report states:

> "For Probate so granted in common form, the only security is the Oath of the Executor; and experience has proved that for the immense majority of cases it is amply sufficient. A very little consideration will show that it would be absolutely impossible to establish any *a priori* guards or cautions, which would not, from the delay and expense, occasion an infinitely greater loss to the Public, than may sometimes arise from what is called snatching Probate of a paper, afterwards found not entitled thereto. Any notice to Heirs-at-law, next of Kin, prior Devisees, or Legatees, would be found utterly incompatible with the expedition and

[248] P. 37.

economy, which are the most essential ingredients in the administration of every-day justice."

However, it must have seemed both inefficient and unduly expensive to require citations to interested parties and proof by both attesting witnesses before the ordinary in a case where there was no controversy whatever as to the due execution of the will.

The present English probate organization distinguishes sharply between contentious and noncontentious business; and it would seem that this distinction bears a direct relation to the maintenance of efficiency in the court organization. Noncontentious business is defined in the Supreme Court of Judicature Consolidation Act of 1925,[249] in almost exactly the same terms as are used in the Court of Probate Act of 1857,[250] as follows:

> "'Noncontentious or common form probate business' means the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, and all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration."

The Principal Registry of Probate at London has jurisdiction of noncontentious business,[251] and legislation also provides that grants may be made in common form by district probate registrars.[252] Without doubt the bulk of the probate business of England is handled as noncontentious business by probate registrars. Otherwise it would be quite impossible for five judges to handle all the probate business for the people of England. In the latest edition of Tristram and Coote's *Probate Practice* this noncontentious procedure is described.[253]

> "The solicitor, in order to obtain a grant of representation to a deceased person in the Principal Registry, must leave at the *Receiver's Department* the 'papers to lead the grant,' viz. the will and codicils (if any); the oath; the bond (if any); the Inland Revenue affidavit, duly stamped, and such affidavits, renuncia-

[249] 15-16 Geo. 5, c. 49, § 175, p. 1197 at 1286 (1925).
[250] 20-21 Vict., c. 77, p. 422 (1857).
[251] 15-16 Geo. 5, c. 49, § 150 (1925).
[252] 15-16 Geo. 5, c. 49, § 151 (1925).
[253] TRISTRAM & COOTE'S PROBATE PRACTICE, 18th ed., 14 (1940).

tions, certificates, etc., as may be necessary. The *Receiver* gives a receipt for the papers . . .

"In the Registry, the calendars are searched to ascertain that no other grant has been made in respect of the same estate, the papers are examined at the "*Seats*" Department, and, if approved, a form of grant is prepared, and attached to a photographic copy of the will and codicils (if any). The grant is signed by the Registrar and sealed with the seal of the Probate Division.

"On the production of the receipt given by the *Receiver* the grant usually can be obtained at the *Sealer's* Department after 12:30 p.m. on the fourth day after the papers were lodged."

Contentious probate business is handled before one or more judges of the High Court.[254]

In the United States the form of probate court organization in the majority of jurisdictions appears to indicate some recognition of the difference between contentious and noncontentious business; though in others this differentiation has apparently been lost sight of. Thus, as is indicated later, in a large group of states an appeal from the decision of the probate court involves a trial de novo in the court of general trial jurisdiction. In those jurisdictions the probate judge ordinarily is not required to have as high qualifications as the trial judge. Not infrequently he is not required to be a member of the bar at all; his salary is, in practically all cases, less than that of the judge of the trial court of general jurisdiction. In a general way it may be said that noncontentious matters come before the probate judge and that, in those matters in which the contest is more serious, the issues are settled before the trial court of general jurisdiction. There is nothing to prevent the probate judge from hearing contentious matters. Indeed, ordinarily he must do so in the first instance. But, if a party is sufficiently interested to appeal, he can have the issues tried anew by the trial judge. In a considerable group of states there is more or less of an attempt to retain the old distinction between probate in common and in solemn form. That is to say, probate may be summary and without notice; or it may be on notice to interested parties; and the proceeding on notice may be either the original hearing or a subsequent hearing on the issue before the same court. In many states provision is made for a proceeding known as a contest, which is a trial of the issue on the due execution of the will. It has sometimes been

[254] 15-16 Geo. 5, c. 49, §§ 20, 55, 56 (1925); 18-19 Geo. 5, c. 26, § 6 (1928).

said that the contest is similar to the old probate in solemn form.[255] However, in some states it would seem to resemble the device of framing the issue *devisavit vel non* and sending it over to a court of law to be tried.[256] Very commonly contest takes place in the trial court of general jurisdiction. A brief consideration of the procedure in a few typical states will illustrate the extent to which there is any differentiation of function with respect to contentious and noncontentious business.

Florida, although it has recently enacted a new probate code,[257] is one of those jurisdictions which still retains something of the old distinction between probate in common and in solemn form. Probate is in the county judge's court. No citation to interested parties before probate is required unless a caveat has been filed by an heir or distributee.[258] Then the caveator must receive notice. When a will is admitted to probate, the personal representative or any other interested person may take steps to have interested parties served with notice, including notice by publication. A subsequent hearing in the judge's court for revocation of probate (which apparently takes the place of the will contest or probate in solemn form found in some states) may be had on the petition of an interested party. The privilege of petitioning for revocation of probate is limited to any heir or distributee of the estate of a decedent except those who have been served with citation before probate or who are barred under section 732.29 (the section dealing with the case where an heir or distributee has filed a caveat).[259]

In Georgia the procedure follows much more closely the English ecclesiastical procedure.[260] Probate may be either in common or in solemn form before the court of ordinary. The statutes also provide for an appeal with trial de novo in the superior court, which is the trial court of general jurisdiction.

In Missouri the original hearing for probate of the will may be without notice,[261] but there is no provision for contest in the probate court. This takes place in the trial court of general jurisdiction and is

[255] See Luther v. Luther, 122 Ill. 558, 13 N. E. 166 (1887); Shaw v. Camp, 61 Ill. App. 68 (1895); Collier v. Idley's Exrs., (N.Y. 1849) 1 Bradf. Surr. 94.

[256] Pa. Stat. Ann. (Purdon, Supp. 1943) tit. 20, § 1961.

[257] Fla. Acts, 1933, c. 16103, p. 544.

[258] Fla. Stat. Ann. (1941) §§ 732.23, 732.29.

[259] Fla. Stat. Ann. (1941) § 732.30.

[260] Ga. Code Ann. (Park, 1937) §§ 113-601, 113-602, 113-605. As to appeals, see §§ 6-201, 6-501.

[261] Mo. Rev. Stat. Ann. (1942) § 529; State ex rel. Mitchell v. Gideon, 215 Mo. App. 46, 237 S.W. 220 (1922).

in the nature of an appeal with trial de novo.[262] Unlike Florida, however, the Missouri statute permits any interested party to contest and does not limit the right to contest to persons who were not served with notice of the original application for probate in the probate court.[263] Missouri is also one of those states which recognizes that an appeal from a decision of the probate court involves a trial de novo of the issues in the circuit court.[264]

In nearly half the states no grant of probate or administration, other than the appointment of a special administrator, is possible without notice to interested parties unless such notice is waived. In some of these there is a provision for contest after probate; in others there is not. In Michigan, for example, there is no provision for contest after probate, as such. But if interested parties file a contest before probate in the probate court, the whole matter may be transferred to the circuit court for hearing.[265] Moreover, provisions for appeal by trial de novo in the circuit court[266] have the effect of a contest after appeal in the trial court of general jurisdiction.

In California the trial court of general jurisdiction, namely the superior court, is the court in which probate matters are heard. Moreover, appeals are not trials de novo but are heard by the same appellate courts which hear appeals in civil cases. In spite of the fact that the petition for probate or administration is always heard on notice to interested parties,[267] statutes provide for a contest after probate, which takes place in the superior court sitting in probate.[268] Contest after probate is permitted by an interested person, "other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein."[269] In California, since notice is required before probate and since the trial court of general jurisdiction is the court handling probate matters, it would seem that the provisions for contest after probate are at variance with any attempt to differentiate between contentious and noncontentious business. Quite possibly contest after probate bears some slight resemblance to probate in solemn form. But if so, it merely means that

[262] Mo. Rev. Stat. Ann. (Supp. 1943) § 538; Techenbrock v. McLaughlin, 209 Mo. 533, 108 S.W. 46 (1908).
[263] Mo. Rev. Stat. Ann. (Supp. 1943) § 538.
[264] Mo. Rev. Stat. Ann. (1942) § 291.
[265] Mich. Stat. Ann. (1943) § 27.3178 (36).
[266] Mich. Stat. Ann (1943) § 27.3178 (36).
[267] Cal. Prob. Code (Deering, 1941) §§ 327, 441.
[268] Cal. Prob. Code (Deering, 1941) § 380.
[269] Cal. Prob. Code (Deering, 1941) § 380.

there may be two hearings, instead of one, on the question of the due execution of the will.

In at least two important jurisdictions, New York and Massachusetts, where proceedings for probate or administration are initiated on notice to interested parties, there is, strictly speaking, neither contest after probate nor trial de novo on appeal.[270] In New York, in order to contest the will, objections must be filed in the surrogate's court at or before the close of testimony for the proponent, or at such subsequent time as the surrogate may direct.[271] But it is clear that this contest takes place in the surrogate's court before the will is admitted to probate. In Massachusetts, the only contest is one arising in the probate court before the will is admitted to probate.[272] The probate judge, however, has the power to send issues to the superior court to be tried there before a jury.[273]

To present an adequate account of the differentiation between contentious and noncontentious business, something should be said with reference to the function of clerks and registers of probate. This matter is discussed at some length in subsequent paragraphs. At this point it may be observed that, in most jurisdictions, the clerk or register has no judicial powers. But, even if he does not, the clerical business of the court may be so handled by him that the judge is enabled to supervise a very large volume of judicial business. This obviously is true in New York City, although the New York statutes do not give the clerk of the surrogate court judicial powers.

By way of conclusion on the general question of the distinction between contentious and noncontentious business, the following observations are presented for consideration: The common practice of having a probate judge with inferior qualifications handle all probate business in the first instance, with contest or trial de novo in the trial court of general jurisdiction, doubtless, in a rough way distinguishes between contentious and noncontentious business. It is true, the probate judge has jurisdiction over contentious as well as noncontentious busi-

[270] See 2 WARREN'S HEATON, SURROGATES' COURTS, 6th ed., § 182 (1941); NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, 3d ed., § 30 (1937).

[271] N. Y. Surrogates' Court Act, § 147. It is true, however, that on an appeal upon the facts, the appellate court has "the same power to decide the questions of fact which the surrogate had" and may receive further testimony. See N. Y. Surrogates' Court Act, § 309.

[272] Mass. Ann. Laws (Michie, 1932) c. 192, §§ 2-3. See also NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, 3d ed., § 30 (1937).

[273] Mass. Ann. Laws (Michie, 1932) c. 215, § 16.

ness. But if a party to the contentious business regards the issue of sufficient importance, he can, by the device of contest or appeal, have it tried again in the trial court. However, it would seem that this is a very inefficient way of distinguishing between contentious and non-contentious business. The probate judge, in spite of his lack of superior qualifications, does try contentious matters in the first instance; and when they are tried anew in the trial court, the result is a wasteful duplication of judicial effort. The prevalent doctrine that there should be one trial and one appeal would seem to be applicable to issues in probate courts as well as elsewhere. Where there is adequate notice for the first hearing and a judge of sufficient ability, there would seem to be little or no justification for a retrial of the issues in the probate or any other court. Such is the result reached in New York and Massachusetts, where no contest after probate is provided for and a judge who is sufficiently qualified to make a final decision on the issues sits in the surrogate or probate court.

There are, however, strong arguments for an ex parte hearing without notice, somewhat like the old probate in common form. This prevents the expense and inconvenience of a special administratorship, and probably results in less wasting of the estate immediately after the death of the decedent. If such a hearing is permitted, it would be possible, as in England, to have its routine handled by clerks or registrars. But the whole matter could well be under the direct supervision of a judge of recognized competence. A further hearing on the issue involved at such summary hearing should then be permitted before the same court, but only on the petition of interested parties who were not served with notice or did not appear in the first hearing.

V

JURISDICTION OF PROBATE COURTS OVER LAND

As has already been indicated,[274] one of the most serious defects in the English probate system of the period prior to the middle of the nineteenth century was the great divergence in the treatment of real and personal estate. The ecclesiastical courts had no jurisdiction whatever over the decedent's land. They admitted wills of personalty to probate; but wills of land were not probated there nor anywhere else. The personal representative took title to personalty; the title to land passed to the heir or devisee immediately on the death of the decedent. But by English legislation previously described[275] the treat-

[274] See subdivision I, supra.

[275] 60-61 Vict., c. 65 (1897).

ment of land and personalty became practically uniform. A will of land is now probated just as a will of personalty. The jurisdiction of the Probate Division over the administration of the decedent's land was accomplished by the simple expedient of a statute which provides that interests in land pass to the personal representative just as chattels had passed theretofore.

We are now ready to consider the question: To what extent have American probate courts acquired jurisdiction over the lands of decedents? Certainly they have departed radically from the pattern of the English ecclesiastical courts; yet it is clear that the development has not been like that of the modern English probate jurisdiction.

The subject of our inquiry is obviously significant as a matter of procedure and due process. It is believed that the entire proceeding to administer the estate of a deceased person is a unit and is a proceeding in rem. If that be true, and if the probate court does in fact administer the real estate of the decedent, then a reasonable notice to interested parties at the time of the initial step in the administration proceeding would suffice for hearing on all subsequent matters.[276] On the other hand, if the probate court has no general jurisdiction over land, but acquires it merely for the purpose of some particular step in the proceeding, such as land sales or the collection of rents, then notice to interested parties must be given at each such step.

Here, however, we are interested primarily in court organization rather than in procedure or due process as such. But in that connection also the question of jurisdiction over land is significant. It is commonly assumed that inferior courts, such as justice courts and county courts, are not to be entrusted with issues involving the determination of titles to land. These matters are normally placed in the hands of the trial judges or of others equally well qualified. If, then, the probate court has jurisdiction of the land of the decedent, that is a strong argument for a highly qualified judge in the judicial organization.

It is believed that in every jurisdiction in this country the probate court has some jurisdiction over land of the decedent. The extent of this jurisdiction, however, varies greatly. For convenience our subject of inquiry may be stated in the form of three questions. First, does the probate court have jurisdiction over the probate of a will of land? Second, to what extent, if any, does the personal representative have title to land during administration? Third, does the probate court

[276] This, of course, refers to a minimum requirement. It would seem desirable, aside from questions of constitutionality, to have some sort of notice for sales of land.

exercise general control over the land of the decedent throughout the course of administration? In other words, is the decedent's land subject to the jurisdiction of the probate court from the initial steps to have the will probated or to secure a grant of administration up to the time of the final order of distribution?

First, as to probate of wills of land, it is believed that the old English doctrine that a will of land is not subject to probate has almost entirely disappeared in this country. In nearly every jurisdiction a testamentary disposition of land must be admitted to probate before devisees can claim under it. This result in many states is based on statutes to the effect that no will is effectual to pass title to real or personal property without probate or that a will cannot be introduced in evidence until admitted to probate.[277] In a very few jurisdictions the necessity for and effect of probate of a will of real property may not be the same as that of a will involving personalty; but it is believed that wills involving real property are subject to probate in all states.[278]

Second, does the personal representative have title to land during administration? In general, the answer is that he does not. That is to say, the majority of jurisdictions adhere to the old English view that title to personalty passes to the personal representative, but that title to real estate passes to the heir or devisee.[279] In no jurisdiction does

[277] See, for example, Mich. Stat. Ann. (1943) § 27.3178 (90): "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal, in the circuit court or supreme court; and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution."

Ky. Rev. Stat. (1942) § 394.130: "No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled."

In some states the courts have decided, without the aid of a statute, that a will devising land must be admitted to probate. Inge v. Johnston, 110 Ala. 650, 20 So. 757 (1895); Farris v. Burchard, 242 Mo. 1, 145 S. W. 825 (1911).

[278] Thus, in New York (N.Y. Surrogates' Court Act, § 144) specific provision is made for the probate of a will involving real property. But there is some question whether this is necessary in all cases. See Bouton v. Fleharty, 215 App. Div. 180, 213 N.Y. Supp. 455 (1926); Corley v. McElmeel, 149 N.Y. 228, 43 N. E. 628 (1896).

And in Tennessee it would appear that a will involving real property must be admitted to probate. Weaver v. Hughes, (Tenn. 1943) 173 S. W. (2d) 159. But the order admitting to probate may not have quite the same conclusive effect on real property which it has with respect to personalty. State v. Lancaster, 119 Tenn. 638, 105 S. W. 858 (1907); Grier v. Canada, 119 Tenn. 17, 107 S. W. 970 (1907).

[279] Hooker v. Porter, 271 Mass. 441, 171 N. E. 713 (1930); Richards v. Pierce, 44 Mich. 444, 7 N. W. 54 (1880); Roorbach v. Lord, 4 Conn. 347 (1822). For statutes providing that real estate passes directly to the heirs or devisees, see N. M. Stat. Ann. (1941) § 33-702; Wash. Rev. Stat. Ann. (Remington, 1932) § 1366. In

title to all the decedent's realty pass to the personal representative as is provided in the present English legislation. It is true, in Georgia, Oregon and Virginia, statutes provide that the title to land registered under Land Registration Acts (that is, so-called Torrens System registration) passes to the personal representative.[280] And a Georgia statute indicates that in that state for some purposes title to devised land passes to the executor and not to the devisee during administration;[281] but legislation in the same state provides that title to intestate land passes to the heir.[282]

In two states,[283] California and Texas, are found statutes which indicate that title to both real and personal property passes to the distributee and not to the personal representative. The California statute is as follows:

> "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division 2 of this code: but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

general, see ATKINSON, WILLS AND ADMINISTRATION 528-530 (1937); 4 PAGE, WILLS, 3d ed., § 1586 (1941).

[280] Ga. Code Ann. (Park, 1937) § 60-508; Ore. Comp. Laws Ann. (1940) § 70-368; Va. Code Ann. (1942) § 5225 (this section provides that the acts establishing the Torrens system be continued in force. Section 61 of that act as amended provides that title to registered land vests in the personal representative).

[281] Ga. Code Ann. (Park, 1937) § 113-801: "All property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

And see Peck v. Watson, 165 Ga. 853, 142 S. E. 450 (1927).

[282] Ga. Code Ann. (Park, 1937) § 113-901: "Upon the death of the owner of any estate in realty, which estate survives him, the title shall vest immediately in his heirs at law, subject to be administered by the legal representative, if there is one, for the payment of debts and the purposes of distribution."

[283] Cal. Prob. Code (Deering, 1941) § 300; Tex. Civ. Stat. Ann. (Vernon, 1935) art. 3314.

In a few other states are found statutes which are to the effect that the property of an intestate person, both real and personal, passes to his heirs subject to the control of the court and to the possession of the administrator. The following are of this variety: Idaho Code Ann. (1932) § 14-102; Mont. Rev. Codes Ann. (McFarland, 1935) § 7072; N. D. Comp. Laws (1913) § 5742; Okla. Stat. Ann. (1941) tit. 84, § 212; S. D. Code (1939) § 56.0102.

Much can be said for legislation of this character. Certainly, there is no real justification today for a distinction between real and personal estate with respect to the title of the personal representative. The explanation for it is purely historical. But it is doubtful whether the modern English rule giving the personal representative title to all property of the decedent, both real and personal, would work well in the United States. Frequently estates are not administered at all. And in such cases the matter of determining title would be simplified if legislation like the California statute just quoted were in force. The title is then in the distributees whether the estate has been administered or not.

Of course, the mere fact that title to realty is in the distributee or is in the personal representative, during administration, does not go far in describing the real situation. In all jurisdictions, regardless of what technical rule is in force as to the location of title, the distributee has some interest in the property as of the time of the decedent's death.[284] On the other hand, even under the California type of statute, it is clear that the personal representative has a very substantial interest in the estate during the course of administration, though it may be described in terms of a right to possession or a power of disposition rather than in terms of title.

The third and most important question to be raised is: Does the probate court exercise jurisdiction over the decedent's lands throughout the course of administration? In many states there can be no doubt that the answer is in the affirmative. Thus, in the California statute as to the title of distributees, which has already been quoted, it is stated that such title is "subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code." Another California statute provides that the personal representative must take possession of all the estate of the decedent, real and personal.[285] In other states the matter is not so clear; no such statutes as these are found. And it is necessary to consider the jurisdiction of the probate court over land in a number of specific situations, such as the contents of the inventory, judicial sales and the decree of distribution. In some of these states we shall find that the jurisdiction of the probate court is limited to particular proceedings with respect to land or to particular lands of the decedent.

[284] See Brewster v. Gage, (C.C.A. 2d, 1929) 30 F. (2d) 604, affd. 280 U. S. 327, 50 S. Ct. 115 (1930).

[285] Cal. Prob. Code (Deering, 1941) § 571.

But in others we may conclude from these specific provisions as to jurisdiction that the court does have general jurisdiction over the decedent's lands during the whole course of administration.

In a majority of states, statutes require that lands be included in the inventory.[286] It is believed, however, that this may not be of great significance in determining the question of jurisdiction.[287] Its purpose may well be to enable the court to determine how large the estate is and whether it is solvent. Thus, in Massachusetts land must be included in the inventory.[288] Yet the personal representative ordinarily has no right to the rents and profits during the administration.[289] The decree of distribution does not deal with real estate.[290] And, while sales of land take place under license of the probate court, the personal representative has no right to deal with any land until such license is obtained.[291] One writer on the subject has summed the matter up by

[286] The statutes in the following states so provide: Ariz. Code Ann. (1939) § 38-803; Cal. Prob. Code (Deering, 1941) § 600; Colo. Stat. Ann. (Michie, 1935) c. 176, § 145; Conn. Gen. Stat. (1930) § 4911 (all the property except real estate situated outside the state); D.C. Code (1940) § 18-401 (inventory includes realty only if court so orders); Fla. Stat. Ann. (1941) § 733.04 (all the property); Ga. Code Ann. (Park, 1936) §§ 113-1401, 113-1402 (includes real estate in the county where administration is had); Idaho Code Ann. (1932) § 15-403; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 323-324; Iowa Code (Reichman, 1939) § 11913; Kan. Gen. Stat. (Corrick, Supp. 1943) § 59-1201; Me. Laws, 1935, c. 78, p. 257; Mass. Ann. Laws (Michie, 1932) c. 195, § 5; Mich. Stat. Ann. (1943) § 27.3178 (382); Minn. Stat. (1941) § 525.33; Mo. Rev. Stat. Ann. (1942) § 58; Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 10131; Neb. Comp. Stat. Ann. (Dorsey, 1929) § 30-401; Nev. Comp. Laws (Hillyer, Supp. 1941) § 9882.100; N. M. Stat. Ann. (1941) § 33-302; N. C. Gen. Stat. Ann. (Michie, 1943) § 28-50; N.D. Comp. Laws Ann. (1913) § 8714; Ohio Gen. Code Ann. (Page, 1937) § 10509-41 (real estate located in Ohio); Okla. Stat. Ann. (1941) tit. 58, § 283; Ore. Comp. Laws Ann. (1940) § 19-401; S. D. Code (1939) § 35.1203; Tex. Civ. Stat Ann. (Vernon, 1925) § 3408; Utah Code Ann. (1943) § 102-7-3; Vt. Pub. Laws (1933) § 2805; Va. Code Ann. (Michie, 1942) § 5403; Wash. Rev. Stat. Ann (Remington, 1932) § 1466; W. Va. Code Ann. (Michie, 1937) § 4182; Wis. Stat. (1943) § 312.01 ("all the property"); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 88-2303.

[287] In Lindholm v. Nelson, 125 Kan. 223 at 229, 264 P. 50 (1928), the court said: "There are several reasons why it is advisable to have the real estate listed in the inventory, but this listing gives the administrator no authority over it, and gives the probate court no jurisdiction to dispose of it, except under conditions specifically provided by statute."

[288] See note 13 supra.

[289] Towle v. Swasey, 106 Mass. 100 (1870).

[290] See NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, 3d ed., § 210 (1937); Mass. Ann. Laws (Michie, 1932) c. 206, § 21.

[291] Hooker v. Porter, 271 Mass. 441, 171 N. E. 713 (1930).

saying:[292] "Ordinarily, unless the will provides otherwise, the executor or administrator has nothing directly to do with real estate." On the other hand, in New York state, where the inventory does not include real estate,[293] the surrogate's court is by statute given power "in the cases and in the manner prescribed by statute . . . . To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof" [294] and perhaps it may be said that the court has at least potential, if not actual, jurisdiction over the decedent's land during probate.

In most states, sales of land to pay debts and legacies are, or can be, handled in the probate court.[295] In others, it is necessary to initiate an independent proceeding in the court of general jurisdiction for this purpose.[296] If a state is of the latter group, it is clear that the probate court does not have general jurisdiction of land of the decedent. On the other hand, if the sale is in the probate court, it may be that, as in Massachusetts, only the specific piece of land to be sold comes under the supervision of the probate court for this purpose.

Other provisions in various states, dealing with the jurisdiction of the probate courts (or of personal representatives) over land in particular situations, are statutes as to the specific performance of land contracts,[297] statutes as to the personal representative's right to the

[292] NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, 3d ed., p. 189, § 76 (1937).

[293] N. Y. Surrogates' Court Act, §§ 195-197.

[294] Id. at § 40. The personal representative is given power to take possession of the real property and sell, mortgage or lease it. N. Y. Decedent Estate Law, §§ 13 and 123. In general, see 3 WARREN'S HEATON, SURROGATES' COURTS, 6th ed., § 230 (1941).

[295] States in which the probate court (or other court exercising probate jurisdiction) does not handle sales of land are Kentucky, Nebraska, New Mexico and West Virginia. In North Carolina the clerk of the superior court has the functions of a probate court, but sales of real estate are handled by the superior court itself. Indiana probably belongs to this group also. In that state the circuit court handles probate business, sitting as a probate court, and also has ordinary civil jurisdiction. Sales of land are handled in this court in a separate proceeding, but it may be questioned whether such a proceeding is in the probate or civil side of the court.

In other states the probate court (or other court exercising probate jurisdiction) has jurisdiction over sales of land. This jurisdiction may be exclusive, e.g., Ga. Code Ann. (Park, 1937) § 24-1901, or concurrent with some other court, e.g., Va. Code Ann. (Michie, 1942) § 5396.

[296] For a statute of this sort, see Neb. Comp. Stat. Ann. (Dorsey, 1929) § 30-1102.

[297] See, for example, Mass. Ann. Laws (Michie, 1932) c. 204, § 1; Mich. Stat. Ann. (1943) § 27.3178 (509) et seq.

possession of land, or to the rents and profits of it, statutes as to his right to bring particular suits with respect to land,[298] statutes providing for a specific decree of distribution to include interests in land, statutes providing for the partition of interests of distributees in land,[299] and statutes providing for the determination of heirship.[300]

Perhaps the most significant of these are the ones dealing with the personal representative's control of real estate and with the decree of distribution. The California statutes requiring the personal representative to take control of real estate have already been referred to.[301] The Indiana statute provides that the personal representative *may* take possession of the real estate if there is no heir or devisee to take possession, but does not require him to do so.[302] Still other states vest the right to possession of land in the heir or devisee.[303] Some statutes expressly provide that the personal representative is entitled to rents

[298] Cal. Prob. Code (Deering, 1941) § 573: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon . . . may be maintained by and against executors and administrators."

Fla. Stat. Ann. (1941) § 733.02 provides that the personal representative may bring actions with respect to real property for the purpose of quieting title for trespass, for waste, and against co-tenants. Provision is also made for heirs or devisees themselves, or jointly with the personal representative, to bring suits for the possession or recovery of real estate or to quiet the title thereto.

While presumably in neither of these states would the suit be brought as an action in probate, the personal representative would, in suing, be acting as an appointee of the court sitting in probate.

[299] These are of two kinds: (a) those providing for partition where the decedent was a co-tenant. Here the suit would not ordinarily be in the probate court. See Cal. Prob. Code (Deering, 1941) § 575. (b) They may provide for a partition in the probate court by heirs or devisees who take the decedent's land as co-tenants.

[300] In a jurisdiction where there is a specific order of distribution which includes land, the proceeding for the determination of heirship is likely to be an independent proceeding, whether it is in the probate court or not, because it is chiefly employed in a case where there has been no administration proceeding. See Minn. Stat. (1941) § 525.31, where the proceeding is in the probate court, and applies to unadministered land or to situations "when real estate or any interest therein has not been included in a final decree." But compare Mich. Stat. Ann. (1943) § 27.3178 (145) to 27.3178 (149) where the determination is in the probate court and may be either independent of or a part of the administration proceeding. Where the personal representative does not take charge of land and the probate court does not purport to distribute it, it would seem that the determination of heirship is an independent proceeding. See Ill. Ann. Stat. (Smith-Hurd, 1935) c. 3, §§ 209-211 (probate court).

[301] See notes 10 and 12 supra.

[302] See Ind. Stat. Ann. (Burns, 1933) § 6-1151.

[303] Mo. Rev. Stat. Ann. (1942) § 129 (personal representative not entitled to possession or to rents and profits except on court order).

and profits of land,[304] and, indeed, this would seem to be implied where he is given a right to possession.

In a considerable number of states the decree of distribution must make a specific distribution of real and personal property of the estate. Thus, the Michigan statute on this subject reads in part as follows:[305]

> ". . . the probate court shall, by order for that purpose, assign the residue of the estate, if any, to such persons as are by law entitled to the same . . . .
>
> "In such order the court shall . . . name the persons and the proportions or parts to which each shall be entitled."

It is not uncommon to have a statute such as the above followed by provisions for the partition of interests of co-distributees. Thus the provisions in the Michigan probate code on this subject begin as follows:[306]

> "When the estate, real or personal, assigned to 2 or more heirs, devisees or legatees shall be in common and undivided, and the respective shares shall not be separated and distinguished . . . the probate court may on the petition of any of the persons interested fix a date for hearing on the partition and distribution."

In other states the only provisions for a decree of distribution are restricted to personal property.[307]

Returning to our original question, it would seem that if statutes give the personal representative possession of the real estate during the administration and provide for a probate decree distributing the real estate to those entitled, the probate court does have jurisdiction over the decedent's lands throughout the course of administration. On the other hand we may in some instances reach the same conclusion without both of these types of statutes. But in other states, all we can conclude is that the probate court does have jurisdiction of the decedent's lands in certain matters during administration.

In conclusion, it is apparent that a majority of probate courts have a very considerable jurisdiction over land. While it is true that the mere filing of an inventory which includes land or the probating of a will devising land does not call for any extensive knowledge of land law, when it comes to making a specific decree distributing land, the same knowledge of the intricacies of the law of real property is required of the probate judge as is called for in the case of the trial judge

[304] E.g., Ariz. Code Ann. (1939) § 38-809.
[305] Mich. Stat. Ann. (1943) §§ 27.3178 (165), 27.3178 (166).
[306] Mich. Stat. Ann. (1943) § 27.3178 (168).
[307] Ore. Comp. Laws Ann. (1940) §§ 19-1201, 19-1202.

who construes a complicated land trust agreement. Indeed, whether the statutes specifically empower the probate court to construe wills or not (and many of them in fact do so) [308] the judge who makes a specific decree of distribution, such as is required by the Michigan statute already quoted, must be prepared to construe an intricate testamentary disposition of land. When we add to that the fact that many statutes also give the probate court jurisdiction of testamentary trusts involving land, and even, in some states, of inter vivos trusts involving land, the conclusion is hard to avoid that a judge is needed in the probate court who is as well qualified as the judge of the trial court of general jurisdiction. Indeed it might be said that he should be a specialist in the law of property in its broadest aspects.

VI

JURISDICTION OF PROBATE COURTS OVER MATTERS OTHER THAN DECEDENTS' ESTATES

The scope of probate court functions has ever been a varying one. We have already traced one aspect of this in noting an expanding jurisdiction and control over the administration of decedents' estates. Jurisdiction in other fields has also been gradually added to that possessed by the probate court as an established institution. The totality of its functions today makes the maintenance of a probate court in every county almost a necessity.

Mention has been made of the origin of orphans' courts in this country.[309] If it was a natural step for probate jurisdiction to be conferred upon orphans' courts, it certainly was not an unnatural step for a jurisdiction over minors and their estates to be added to organized probate courts elsewhere. The historical amalgamation of guardianship and curatorship with probate jurisdiction is readily understandable where occasioned by the administration upon a decedent's estate in which minors are interested.

In England guardians of the person and property of minors were appointed by the court of chancery and the court of exchequer.[310] They were also appointed by ecclesiastical courts with respect to personalty.[311] In America a general power to make such appointments has always been regarded as inherent in courts possessing equity powers.[312] No interest

[308] N. Y. Surrogates' Court Act § 40, subd. 8.

[309] See discussion under II-B at note 59 supra.

[310] WOERNER, AMERICAN LAW OF GUARDIANSHIP § 16 (1897).

[311] Id. at § 3.

[312] Id. at § 18.

in a decedent's estate is necessary to invoke this power. But the expensiveness and cumbersomeness of equity procedure early led to giving this jurisdiction—at least a concurrent one—to other courts.[313] Guardianship of the persons of minors and of their estates has since become an established part of probate jurisdiction.[314] A constitutional provision conferring general jurisdiction upon probate courts in all probate matters has been said to include the power to appoint guardians.[315] Only in rare cases does equity appoint guardians or assume a continuing control over them.[316]

[313] See, for example, Complete Revisal of all the Acts of Assembly of the Province of North Carolina, printed by Davis, 285-291 (1773) and Laws of North Carolina, edited by Iredell, 202-208 (1791) (act of 1762). See also WOERNER, AMERICAN LAW OF GUARDIANSHIP, § 18 (1897).

[314] This development is fully described in WOERNER, AMERICAN LAW OF GUARDIANSHIP § 24 (1897). Jurisdiction over guardians of minors and their estates is vested in the court exercising probate jurisdiction as follows: Ala. Code Ann. (1940) tit. 13, § 278; Ariz. Code Ann. (1939) § 42-101; Ark. Dig. Stat. (Pope, 1937) § 2883; Cal. Prob. Code (Deering, 1941) § 1405; Colo. Const., art. 6, § 23; Colo. Stat. Ann. (Michie, 1935) c. 76, § 1, c. 176, § 83; Conn. Gen. Stat. (1930) §§ 4973, 4808; Del. Rev. Code (1935) c. 89; D. C. Code (1940) § 11-504; Fla. Stat. Ann. (1941) § 36.01; Ga. Code Ann. (Park, 1936) § 24-1901; Idaho Const., art. 5, § 21; Idaho Code Ann. (1932) § 1-1202; Ill. Const., art. 6, §§ 18, 20; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, § 303; Ind. Stat. Ann. (Burns, 1933) §§ 4-303, 4-2910, 4-3010; Iowa Code (Reichmann, 1939) § 10763; Kan. Const., art. 3, § 8; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-301; Ky. Rev. Stat. (1942) §§ 25.110, 387.020; Me. Rev. Stat. (1930) c. 75, § 9; Md. Ann. Code (Flack, 1939) art. 93, § 152; Mass. Ann. Laws (Michie, 1932) c. 215, §§ 3, 4; Mich. Stat. Ann. (1943) § 27.3178(19); Minn. Const., art. 6, § 7; Minn. Stat. (1941) § 525.54; Miss. Code Ann. (1942) § 404; Mo. Const., art. 6, § 34; Mo. Rev. Stat. Ann. (1942) § 2437; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10401; Neb. Const., art. 5, § 16; Neb. Comp. Stat. Ann. (Dorsey, 1929) §§ 27-503, 27-504; Nev. Const., art. 6, § 6; N. H. Rev. Laws (1942) c. 346, § 4; N. J. Rev. Stat. (1937) §§ 3:7-23.1, 3:7-28; N. M. Stat. Ann. (1941) § 16-410; N. Y. Surrogates' Court Act, §§ 40, 173; N. C. Gen. Stat. Ann. (Michie, 1943) §§ 2-16, 33-1; N. D. Const., art. 4, § 111; N. D. Comp. Laws Ann. (1913) § 8524; Ohio Const., art. 4, § 8; Ohio Gen. Code Ann. (Page, 1937) § 10501-53; Okla. Const., art. 7, § 13; Okla. Stat. Ann. (1941) tit. 20, § 271; Ore. Comp. Laws Ann. (1940) §§ 13-501, 22-101; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 2241; R. I. Gen. Laws Ann. (1938) c. 426 and c. 569, § 1; S. C. Code Ann. (1942) §§ 208, 209; S. D. Const., art. 5, § 20; S. D. Code (1939) §§ 35.1801 et seq. and 32.0909; Tenn. Code Ann. (Michie, 1938) § 10225; Tex. Const., art. 5, § 16; Tex. Civ. Stat. Ann. (Vernon, 1925) art. 4102 et seq.; Utah Code Ann. (1943) § 102-131 et seq.; Vt. Pub. Laws (1933) § 2723; Va. Code Ann. (Michie, 1942) § 5316; Wash. Rev. Stat. Ann. (Remington, 1932) § 1371; W. Va. Const., art. 8, § 24; W. Va. Code Ann. (Michie, 1937) § 357; Wis. Stat. (1943) §§ 253.03, 319.01; Wyo. Rev. Stat. Ann. (Courtright, 1931) c. 50.

[315] Stewart Oil Co. v. Lee, (Tex. Civ. App. 1943) 173 S. W. (2d) 791; United States Fidelity & Guaranty Co. v. Hansen, 36 Okla. 459, 129 P. 60 (1912); Monastes v. Catlin, 6 Ore. 119 (1876).

[316] WOERNER, AMERICAN LAW OF GUARDIANSHIP 52-53 (1897).

Guardianship over insane persons, lunatics, idiots, imbeciles or incompetents by whatever name they may be called, originally within the jurisdiction of the English chancery courts, has also been lodged for the most part in established probate courts in this country or in courts exercising probate jurisdiction.[317]

Recognizing the need for some supervision over incompetents and to satisfy the requirement of the federal law designed to insure that the compensation and insurance paid by the U.S. Veterans' Bureau is properly conserved for their benefit, servicemen, their estates and dependents, thirty-four states have enacted the Uniform Veteran's Guardianship Act with some variations.[318] A degree of uniformity has thus been attained in the appointment of guardians for such servicemen and the administration of their estates derived from the Veterans' Administration. The original act as promulgated by the Commissioners on Uniform State Laws in 1928 provides for guardianship proceedings

[317] Ibid. Curatorship or conservatorship over estates of insane persons and other incompetents is vested in the court exercising probate jurisdiction as follows: Ala. Code Ann. (1940) tit. 13, § 278; Ariz. Code Ann. (1939) § 42-135; Ark. Dig. Stat. (Pope, 1937) § 2883; Cal. Prob. Code (Deering, 1941) § 1405; Colo. Const., art. 6, § 23; Colo. Stat. Ann. (Michie, 1935) c. 105, § 9, c. 176, § 84; Conn. Gen. Stat. (1930) § 4815; Del. Rev. Code (1935) c. 89; D. C. Code (1940) tit. 21, c. 2 (limited jurisdiction only); Fla. Stat. Ann. (1941) § 744.24 et seq.; Ga. Code Ann. (Park, 1936) § 24-1901; Idaho Const., art. 5, § 21; Idaho Code Ann. (1932) § 1-1202; Ill. Const., art. 6, §§ 18, 20; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, § 303; Ind. Stat. Ann. (Burns, 1933) §§ 4-303, 4-2910, 4-3010; Iowa Code (Reichmann, 1939) § 10763; Kan. Const., art. 3, § 8; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-301; Ky. Rev. Stat. (1942) §§ 25.110, 387.020, 387.210; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (Michie, 1932) c. 215, § 3; Mich. Stat. Ann. (1943) § 27.3178(19); Minn. Const., art. 6, § 7; Minn. Stat. (1941) § 525.54; Miss. Code Ann. (1942) § 430; Mo. Const., art. 6, § 34; Mo. Rev. Stat. Ann. (1942) § 2437; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10412; Neb. Const., art. 5, § 16; Neb. Comp. Stat. Ann. (Dorsey, 1929) §§ 27-503, 27-504; Nev. Const., art. 6, § 6; N. H. Rev. Laws (1942) c. 346, § 4; N. J. Rev. Stat. (1937) §§ 3:7-33, 3:7-41; N. M. Stat. Ann. (1941) § 16-410; N. C. Gen. Stat. Ann. (Michie, 1943) §§ 2-16, 33-1; N. D. Const., art. 4, § 111; N. D. Comp. Laws Ann. (1913) § 8524; Ohio Const., art. 4, § 8; Ohio Gen. Code Ann. (Page, 1937) § 10501-53; Okla. Const., art. 7, § 13; Okla. Stat. Ann. (1941) tit. 20, § 271; Ore. Comp. Laws Ann. (1940) §§ 13-501, 22-101; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 2241; R. I. Gen. Laws Ann. (1938) c. 426 and c. 569, § 1; S. C. Code Ann. (1942) §§ 208, 209; S. D. Const., art. 5, § 20; S. D. Code (1939) §§ 35.1801 et seq. and 32.0909; Tenn. Code Ann. (Michie, 1938) § 10225; Tex. Const., art. 5, § 16; Tex. Civ. Stat. Ann. (Vernon, 1925) art. 4102 et seq.; Utah Code Ann. (1943) § 102-13-1 et seq.; Vt. Pub. Laws (1933) § 2723; Va. Code Ann. (Michie, 1942) § 1050; Wash. Rev. Stat. Ann. (Remington, 1932) § 1371; W. Va. Const., art. 8, § 24; W. Va. Code Ann. (Michie, 1937) § 357; Wis. Stat. (1943) §§ 253.03, 319.01; Wyo. Rev. Stat. Ann. (Courtright, 1931) c. 50.

to be had in "any court of competent jurisdiction."[319] The revision of this act by the commissioners in 1942 makes no mention of any specific court.[320] Nowhere is a reference to be found as to whether the probate, equity or court of general jurisdiction is referred to. Presumably the court where guardianships for other incompetents are cognizable is intended.

Jurisdiction over juvenile delinquents has involved totally different problems from general supervision over the property of minors or incompetents. Juvenile courts have been created in many places.[321] In some states such jurisdiction has been merely added to that of courts of general jurisdiction. In Idaho, Michigan and South Dakota it has been tacked on to the jurisdiction of probate courts.[322]

More closely related to the primary function of the administration of estates is the supervision over testamentary trusts. While it is true that the administration of a decedent's estate ceases upon final settlement and distribution by the personal representative to the testamentary trustee, it is also true, in a very real sense, that the subsequent administration by the testamentary trustee is but a continuation of the administration by the executor or administrator. In any matter requiring it, the jurisdiction of equity might be invoked at the instance of the trustee or of any beneficiary either as a remedial or a declaratory process. Any such procedure could be repeated any number of times. The more often equity jurisdiction is invoked in the administration of a single trust, the more nearly it approaches complete supervisory jurisdiction. Equity has the power to exercise and frequently does exercise such complete supervision. Because of the similarity of the problems involved, the close relationship between the probate administration of the decedent's estate and the continued administration of the testamentary trust created by the decedent's will, and the fact that the trustee is often the same person who has served as executor, there has been a marked tendency to subject the latter administration to probate, rather than equity, supervision. Such is now an integral part of the

[318] See 9 UNIFORM LAWS ANNOTATED 735 (1942).

[319] Uniform Veteran's Guardianship Act (1928) § 4.

[320] Uniform Veterans' Guardianship Act (1942) § 5.

[321] For a discussion of this jurisdiction and of the various courts established to handle such matters, seee 5 VERNIER, AMERICAN FAMILY LAWS, § 277 (1932) and Supplement (1938).

[322] Idaho Code Ann. (1932) § 31-1302; Mich. Const., art. 7, § 13; Mich. Stat. Ann. (1943) § 27.3178(571); S. D. Code (1939) § 43.0302. In a few other states probate courts have been given jurisdiction in juvenile matters in certain counties.

probate statutes of some twenty-four states.[323] An examination of these statutes reveals that the amount of such supervision varies from a duty on the part of the trustee to account periodically to the court to a more or less complete supervision approximating that of the probate court over the executor in the prior administration of the estate of the decedent.

Many of the same arguments could be assigned for subjecting inter vivos trusts to the same supervision. Only a preceding probate administration is lacking. However, many settlors prefer not to subject the trust created by them to judicial supervision, but to rely upon the integrity and ability of the trustee whom they have selected. Indiana, Iowa, Massachusetts, Nevada and Pennsylvania have brought inter vivos trusts under the supervisory control of probate courts.[324] In Maine such jurisdiction may be invoked either in the probate or superior court.[325] In Kansas such jurisdiction is possible where the beneficiary is a person under guardianship.[326] Recent legislation has extended this jurisdiction to include life insurance trusts in Pennsylvania.[327]

[323] Ariz. Code Ann. (1939) § 38-1509 (for settlement of accounts); Cal. Prob. Code (Deering, 1941) § 1120; Colo. Stat. Ann. (Michie, Supp. 1943) c. 176, § 227 (but testator may provide for no supervision in county court); Conn. Gen. Stat. (1930) §§ 4972-4976; Ind. Stat. Ann. (Burns, 1933) §§ 4-2910, 4-3010 (in Marion and Vanderburgh counties) and (Burns, Supp. 1943) §§ 6-2501 to 6-2526; Iowa Code (Reichmann, 1939) §§ 10764, 11876; Kan. Gen. Stat. Ann. (Corrick, 1943) §§ 59-1601 to 59-1611 (but testator may provide for no supervision in probate court); Me. Rev. Stat. (1930) c. 75, § 2, c. 82, §§ 1-13 (concurrent with superior court); Mass. Ann. Laws (Michie, 1932) c. 215, § 6; Mich. Stat. Ann. (1943) § 27.3178(19); Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10352; Neb. Comp. Stat. Ann. (Kyle, Supp. 1941) §§ 30-1801 to 1806; Nev. Comp. Laws (Hillyer, Supp. 1941) §§ 7718-7718.26; N. H. Rev. Laws (1942) c. 363; N. J. Rev. Stat. (Supp. 1941-43) §§ 3:7-13.4, 3:7-13.5 (only to qualify and have letters issued); N. Y. Surrogates' Court Act, §§ 167-171 (limited control); N. C. Gen. Stat. Ann. (Michie, 1943) § 28-53 (for filing inventory and rendering accounts); Ohio Gen. Code Ann. (Page, 1937) §§ 10501-53, 10506-39; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 2242 (orphans' court); S. C. Code Ann. (1942) § 209; Utah Code Ann. (1943) §§ 102-12-31, 102-12-32 (for rendition of accounts); Vt. Pub. Laws (1933) c. 134 (for rendition of annual accounts); Wash. Rev. Stat. Ann. (Remington, Supp. 1941) §§ 11548-1 to 11548-28, as amended by Wash. Laws, 1943, c. 152; Wis. Stat. (1943) § 253.03.

[324] Ind. Stat. Ann. (Burns, 1933) §§ 4-2910, 4-3010 and (Burns, Supp. 1943) §§ 6-2512 et seq.; Iowa Code (Reichmann, 1939) §§ 10764, 11876; Mass. Ann. Laws (Michie, 1932) c. 215, § 6; Nev. Comp. Laws (Hillyer, Supp. 1941) §§ 7718.11, 7718.12; Pa. Stat. Ann. (Purdon, Supp. 1943) tit. 20, § 2253a.

[325] Me. Rev. Stat. (1930) c. 75, § 2; c. 82, §§ 14-16.

[326] Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-1601 to 59-1611.

[327] Pa. Stat. Ann. (Purdon, Supp. 1943) tit. 20, § 2253b.

A number of other functions have been added piecemeal to the broadening horizon of probate jurisdiction. Marriages may be solemnized by probate judges in some states.[328] Divorces may be granted in the probate courts of Massachusetts,[329] and in the county courts of Colorado [330] if the amount of alimony sought does not exceed $2000. Adoption proceedings have been lodged here in more than one-third of the states; [331] and proceedings for change of name in a few states.[332] The granting of writs of habeas corpus has also been given to some probate courts,[333] presumably on the assumption that when the general trial judge is not available, the probate judge can function since he is a judicial officer.

The combination of small civil and criminal jurisdiction with probate matters has been alluded to in discussing the early history of pro-

[328] No attempt is made here to collect the legislation on this subject. Frequently this power is bestowed upon judges of courts of record.

[329] Mass. Ann. Laws (Michie, 1932) c. 215, § 3.

[330] Colo. Stat. Ann. (Michie, 1935) c. 56, § 3.

[331] Ala. Code Ann. (1940) tit. 27, §§ 1-9; Ark. Dig. Stat. (Pope, 1937) § 254; Colo. Stat. Ann. (Michie, 1935) c. 4, § 1 (jurisdiction in district or county court provided there is no juvenile court in the county); Conn. Gen. Stat. (1930) §§ 4809-4810; Del. Rev. Code (1935) §§ 3550-3553 (orphans' court); Idaho Code Ann. (1932) § 31-1106; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 4, §§ 1-13 (in circuit or county court); Ind. Stat. Ann. (Burns, Supp. 1943) § 3-115; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-2101; Ky. Rev. Stat. (1942) §§ 405.140 to 405.990; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (Michie, 1932) c. 210, § 1 and c. 215, § 3; Mich. Stat. Ann. (1943) § 27.3178 (541) et seq.; Neb. Comp. Stat. Ann. (Dorsey, 1929) § 43-101 et seq.; N. H. Rev. Laws (1942) c. 346, § 5; N. J. Rev. Stat. (1937) § 9:3-1 (orphans' court); N. Y. Domestic Relations Law § 109 et seq. (concurrent with certain other courts); Ohio Gen. Code Ann. (Page, Supp. 1943) §§ 10512-9 to 10512-23; Okla. Stat. Ann. (1941) tit. 10, §§ 46, 49; Ore. Comp. Laws Ann. (1940) § 63-401; Pa. Stat. Ann. (Purdon, Supp. 1943) tit. 1 §§ 1-5 (orphans' court except in Philadelphia county where the municipal court has jurisdiction); R. I. Gen. Laws Ann. (1938) c. 569, § 1; S. D. Code Ann. (1939) §§ 14.0401 to 14.0408; Tenn. Code Ann. (Michie, 1938) §§ 9561, 10225 (concurrent with circuit court); Vt. Pub. Laws (1933) § 3322 as amended by Vt. Laws, 1941, No. 46, § 2; Wis. Stat. (1943) c. 322.

In Arizona, California, Iowa, Louisiana, Nevada, North Carolina, Utah, Virginia, Washington and Wyoming adoption proceedings are had in the court of general jurisdiction, which also handles probate matters.

[332] Ky. Rev. Stat. (1942) §§ 401.010 to 401.040; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (Michie, 1932) c. 215, § 3; Mich. Stat. Ann. (1943) § 27.3178 (541-545, 561-562); Ore. Comp. Laws Ann. (1940) §§ 11-701 to 11-703; R. I. Gen. Laws Ann. (1938) c. 569, § 1; Tenn. Code Ann. (Michie, 1938) § 10225.

[333] Ala. Code Ann. (1940) tit. 13, § 297; Ind. Stat. Ann. (Burns, 1933) § 4-2910; Kan. Const., art. 3, § 8; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-301; Ohio Const., art. 4, § 8; Ohio Gen. Code Ann. (Page, 1937) § 10501-53; Ore. Const., art. 7, § 13.

bate courts.[334] In a dozen states at the present time limited civil and criminal jurisdiction is lodged in the court having probate jurisdiction.[335]

Some form of inheritance or estate taxes are now levied by every state except Nevada. The assessment of such a tax must needs occur more or less contemporaneously with the administration of the estate, because values at the date of death will determine the amount of tax and payment by the personal representative out of assets in his hands is the most feasible and certain way of securing payment to the sovereign. In the determination of the tax the services and offices of the probate court in charge of the administration will be needed. The nature of the part to be played by the probate court in the accomplishment of this task varies all the way from furnishing information to those actually assessing the tax to the actual assessment of the tax itself. The former method of having the probate court furnish the information and data to those charged with the assessing function exists in Delaware, Oklahoma and South Carolina.[336] In nearly half the states this task is performed by or under the direction of the probate court,[337] while in a few others the probate court on appeal may hear and determine all questions relating to such tax.[338]

[334] See discussion under II-B and notes 72 and 73 supra.

[335] A limited civil or criminal jurisdiction, or both, is vested in the court having jurisdiction in probate matters in Colorado, Florida, Georgia, Idaho, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Wisconsin.

[336] Del. Rev. Code (1935) § 138; Okla. Stat. Ann. (1941) tit. 68, § 989r; S. C. Code Ann. (1942) § 2489.

[337] Cal. Gen. Laws (Deering, 1937) Act 8495, §§ 15, 16; Colo. Stat. Ann. (Michie, 1935) c. 85, § 59; Conn. Gen. Stat. (Supp. 1935) § 1380; Idaho Code Ann. (1932) § 14-417; Ill. Ann. Stat. (Smith-Hurd, 1940) c. 120, §§ 385, 388; Ind. Stat. Ann. (Burns, 1933) § 6-2410; Iowa Code (Reichmann, 1939) § 7336; Md. Ann. Code (Flack, 1939) §§ 81-109 to 81-140; Minn. Stat. (1941) § 291.25; Mo. Rev. Stat. Ann. (1942) § 586 ;Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10400.13; Neb. Comp. Stat. Ann. (Dorsey, 1929) §§ 77-2211, 77-2213; N. Y. Tax Law §§ 249t, 249w; N. D. Comp. Laws Ann. (Supp. 1925) §§ 2346 b 26, b 25, b 38 as amended by N. D. Laws, 1927, c. 267, § 4; Ohio Gen. Code Ann. (Page, 1937) §§ 5340, 5345; Ore. Comp. Laws Ann. (1940) § 20-135; Pa. Stat. Ann. (Purdon, 1930) tit. 72, § 2321; S. D. Code (1939) §§ 57.2202, 57.2305, 57.2307; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 7131; Utah Code Ann. (1943) § 80-12-15; Vt. Pub. Laws (1933) §§ 1058, 1063-1067; Wis. Stat. (1943) §§ 72.12, 72.15, 72.55.

[338] Ark. Acts, 1941, Act 136, p. 333; Conn. Gen. Stat. (1930) § 1384; Ill. Ann. Stat. (Smith-Hurd, 1940) c. 120, § 388; Mass. Ann. Laws (Michie, 1932) c. 65, § 27; N. Y. Tax Law, § 249x; Va. Code Ann. (Michie, 1942) § 110; W. Va. Code Ann. (Michie, 1937) § 862.

VII

THE PERSONNEL OF THE PROBATE COURT

A. *The Probate Judge*

The problem of probate court organization is not unrelated to the personnel of probate courts. Efficiency of operation demands competence on the part of those persons who are charged with the duty of administering the business of such courts. In the administration of decedents' estates probate courts have supervision of matters having a financial value far in excess of what is commonly believed. Justices of the peace are usually restricted to a jurisdiction of a few hundred dollars, whereas probate judges are given exclusive jurisdiction of estates that may be valued in the thousands or millions of dollars. In approximately one-half of the states, it is possible to elect laymen to office. The probate court of one such state has been characterized as "a court that is not required to know any law and that does not know any more than the law requires."[339]

1. *American Failures to Appraise the Standards for the Office*

It is generally accepted that supreme court and trial judges should be capable men—"learned in the law," as is sometimes said. From the earliest time such a requirement has occupied a permanent place in the constitutions of most states. In the few states where this is not a constitutional or statutory requirement, persons elected or appointed to such positions have nevertheless been lawyers, due largely to the general feeling that such should be the case. Similar requirements were seldom made for probate judges. The reasons for this were several. In the first place, most of the work of probate judges was nonlitigious in character. It was also largely administrative. Secondly, the creation of separate probate courts in each county has given rise to a belief that each county could not support an office of probate judge with such qualifications. Furthermore, men with such qualifications have not always been available in every commnity. Lower requirements, shorter tenure, and smaller salaries have been the solution.[340]

In the meantime the economic and social elements of life have become more complex and technical. This is reflected in the complex provisions of wills and trusts, and the character of property ownership,

[339] Caron v. Old Reliable Gold Mining Co., 12 N. M. 211 at 226, 78 P. 63 (1904).

[340] See Atkinson, "Organization of Probate Courts and Qualifications of Probate Judges," 23 J. AM. JUD. SOC. 93 at 94 (1939).

all of which require the supervision of probate judges. The probate of wills, the granting of letters, and the approval of final settlements no longer constitute the bulk of their duties. A knowledge of business, investments and accounting are a necessary part of the equipment of a modern probate judge. Complicated wills require interpretation to assure proper administration and distribution. Under many statutes the equitable jurisdiction of probate courts has been increased in response to a need.[341] Indeed our probate courts have always combined the jurisdiction and powers of the English ecclesiastical and chancery courts, but seldom have we stopped to consider the full implications of this latter jurisdiction. The modern probate judge needs to know, more than ever before, general substantive law in order to supervise the activities of fiduciaries and to insure justice to every class of beneficiaries. Furthermore the whole problem of the administration of decedents' estates needs to be viewed as one of transferring the various forms of wealth owned and controlled by the decedent to the persons ultimately entitled thereto, viz., creditors, the state (as entitled to inheritance taxes), heirs, devisees, and legatees. The task requires not merely a manual transfer, but an effective legal transfer so that there will be no cause to question its effectiveness in the future. The very fact of the nonlitigious character of the proceeding suggests that an additional competence and intelligence be exercised by those entrusted with this duty.

Another phenomenon has also occurred to increase and complicate the task of the probate judge. Guardianships and curatorships of minors, insane persons, incompetents and war veterans, adoptions, change of name, solemnization of marriages and granting of divorces in some few states, have been added gradually to that of administering decedents' estates. Each of these functions demands a penetrating and specialized understanding of human nature.[342] In a number of states jurisdiction over testamentary trusts, and in a few instances over inter vivos and insurance trusts, has been added. Some part in the assessment of inheritance taxes has been added to probate duties in practically every state. In the midst of these added duties, no probate judge has been heard to complain of lack of sufficient work to do.

2. *Standards for the Office of Probate Judge*

(a) *Qualifications.* The qualifications required for office of probate judge have not been as exacting as those of general circuit or district

[341] For a recent summary of this development see note, "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 YALE L. J. 1273 (1939).

[342] See discussion under VI supra.

judges. Admission to the bar or being learned in the law is a usual constitutional requirement for the latter. Legal or judicial experience is commonly an additional requirement. In the case of probate judges, however, the standards are but faintly comparable. In approximately one-half of the states[343] probate judges are not required to be lawyers or to have had any legal experience. This makes it possible for laymen to administer the affairs of this office, and in many localities this is the case.[344] It has been observed many times that a law school diploma and membership in the bar are not in themselves certifications of competence. It is equally true that the absence of these is not a mark of incompetence. The affairs of many probate courts presided over by laymen are administered with integrity and common sense. But it should be obvious that no layman, however efficient or conscientious, should be expected to appreciate and pass upon the multitudinous legal aspects involved in the administration of an estate. The fact that he can fill out the blanks in a printed form does not imply an intelligence necessary for the effective sale or lease of a piece of real estate owned by the decedent, nor the wisdom to adjudicate the conflicting claims of heirs or beneficiaries. Since many matters are not questioned at the time or subjected to the scrutiny of immediate appellate review, something close to perfection is desirable to eliminate any question of their efficacy at some distant time.

Maine, Maryland, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota and Wisconsin have seen fit to require that probate judges shall have become members of the bar as a prerequisite to holding office.[345] In California, Nevada, Washington, Montana, Wyoming, Utah, Arizona, Iowa, Indiana, Louisiana, Virginia and North Carolina, probate matters are under the jurisdiction of the courts

[343] Alabama, Colorado, Connecticut, Delaware (register of wills), Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey (surrogates' and orphans' court judges), Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin (in a very few counties).

[344] As an example, see Smith, "Some Comments on the District Probate System," 7 CONN. BAR J. 56 (1933).

[345] Me. Rev. Stat. (1930) c. 75, § 3, as amended by Me. Laws, 1933, c. 62; Md. Const., art. 4, § 2; N. Y. Const., art. 6, § 19 (except as to county of Hamilton); N. D. Const., art. 4, § 111; Ohio Gen. Code Ann. (Page, 1937) § 10501-1 (or have previously served as probate judge immediately prior to election); Okla. Const., art. 7, § 11; Pa. Const., art. 5, § 22; S. D. Const., art. 5, § 25; Wis. Stat. (1943) § 253.02 (except in counties having a population of less than 14,000 or have previously served as probate judge provided the county court has no civil or criminal jurisdiction).

of general jurisdiction and hence administered by the judges of those courts. Among this group of states, all but Indiana and North Carolina make admission to the bar an essential requirement in order to qualify for this office.[346] And in Arkansas and Mississippi, where probate matters come under the jurisdiction of chancery judges, a similar requirement is made of these judges.[347] In Maryland, Massachusetts, New Jersey, New York and Pennsylvania, where probate courts are essentially on a par with the courts of general jurisdiction, the requirements for the office of probate judge are in each instance the same as for trial judges and include admission to the bar,[348] except in Massachusetts and New Jersey where no such requirement is made for any judicial office. It should be said, however, that the long record of successful judicial administration in that state indicates the presence of other factors in producing the high quality of its judiciary.

To inaugurate a system in any state designed to raise the qualifications for probate judges is easier said than done. In the first place the public is not fully appreciative of the necessity of such a move, for the reasons already discussed. Secondly, there are laymen already occupying these offices, some of whom are doing a creditable job, who feel that they have a vested interest in that office as long as their constituents are willing to elect them. Such a system was proposed in Kansas in 1939 in connection with the adoption of a new probate code which had been carefully studied and drafted to accomplish a needed improvement in probate administration. In order not to oust those who had previously held the office of probate judge, it was provided that only members of the bar or past probate judges should be eligible for that office. The pressure against this reform, however, was so great as to cause its elimination from the code upon its adoption.[349] Such a provision did find approval in Ohio and Wisconsin, however.[350]

(b) *Method of Selection.* Originally surrogates or deputies held their offices by appointment from the governor. With an increasing need for permanent deputies of that kind, the office became assimilated

[346] Ariz. Const., art. 6, § 5; Cal. Code Civ. Proc. (Deering, 1941) § 157; Cal. Const., art. 6, § 23; Iowa Code (Reichmann, 1939) § 10815; La. Const., art 7, § 39; Mont. Const., art. 8, § 16; Nev. Comp. Laws (Hillyer, Supp. 1941) § 618; Utah Const., art. 8, § 5; Va. Const., art. 6, § 96; Wash. Const., art. 4, § 17; Wyo. Const., art. 5, § 12.

[347] Ark. Const., art. 7, § 16; Ark. Dig. Stat. (Pope, 1937) § 2819; Miss. Const., art. 6, § 154.

[348] Md. Const., art. 4, § 2; N. Y. Const., art. 6, § 19; Pa. Const., art. 5, § 22.

[349] See note to § 3 of "The Kansas Probate Code," 13 KAN. JUD. COUN. BUL. 12 (1939).

[350] Ohio Gen. Code Ann. (Page, 1937) § 10501-1; Wis. Stat. (1943) § 253.02.

to various other judicial offices for the purpose of selecting the occupant. In New York and New Jersey, for example, the office of surrogate, originally appointive, later became elective. The judges of the orphans' courts in Delaware and New Jersey, and the probate judges of Massachusetts and New Hampshire are appointed by the governors of those states, as are the judges of courts of general jurisdiction.[351] Circuit judges in Virginia, who exercise most of the control over the administration of estates are chosen by the legislature;[352] but the clerks of the circuit courts in Virginia, who exercise a small part of probate jurisdiction, are elected locally.[353] Probate judges in Rhode Island are elected by the town councils.[354] In Connecticut, Florida and Maine probate judges are elected, whereas general trial judges are appointed by the governor.[355] Elsewhere the office of probate judge is elective.

It would be beyond the scope of this study to discuss the relative merits of the various methods of selecting judges. The appointive method is largely confined to a few eastern states and a portion of New England. The experience of that system over a period of several generations has been found to secure the very best in judicial talent.[356] Where general trial judges are appointed, there would seem to be no reason for employing a different method in the selection of probate judges.

(c) *Tenure.* The question of tenure, like that of qualifications for office, has received much discussion.[357] Frequent approval of judicial officers by means of frequent elections is said to represent a democratic ideal. Longer tenure designed to secure an efficient, fearless and courageous administration of office is a contrary objective. A tenure of such duration as to attract competent, public-spirited men from a

[351] Del. Const., art. 4, § 3; N. J. Const., art. 7, § 2 (2); N. J. Rev. Stat. (1937) § 2:6-2; Mass. Const., c 2, § 1, art. 9; N. H. Const., arts. 46, 73. Such appointments must be confirmed by the senate in Delaware and New Jersey. The United States district judges in the District of Columbia, who also sit in probate, are appointed by the President of the United States.

[352] Va. Const., art. 6, § 96.

[353] Va. Const., art. 6, § 112; Va. Code Ann. (Michie, 1942) § 124.

[354] R. I. Gen. Laws Ann. (1938), c. 568, § 3.

[355] Conn. Const., art. 5, § 3 and amend. 21; Conn. Gen. Stat. (1930) § 4764 (superior court judges are appointed by the legislature upon nomination by the governor); Fla. Const., art. 5, §§ 8, 16; Me. Const., art. 6, §§ 4, 7; Me. Rev. Stat. (1930) c. 75, § 3. Confirmation of circuit judges by the senate is required in Florida.

[356] See references under note 357 infra.

[357] See "Report of Special Committee on Judicial Selection and Tenure," 63 AM. B. A. REP. 406 (1938); Hutcheson, "Administrative Officers," 23 A.B.A.J. 930 (1937); McCormick, "Judicial Selection—Current Plans and Trends," 30 ILL. L.

more lucrative business is of primary importance. In each state the term of office is likely to emphasize only one of these ideals or objectives.

Terms of office range all the way from one year to life tenure. Two and four year terms are most common, though six years is not uncommon. The term of judges of the orphans' courts in Pennsylvania is ten years, in Delaware twelve years, and in Maryland fifteen years. The surrogates in New York City are elected for terms of fourteen years, whereas surrogates in other counties of New York hold office for only six years.[358] In the District of Columbia, Massachusetts, and New Hampshire probate judges are appointed for life.[359]

These terms of office in themselves are significant only as they reflect one or more of the objectives enumerated above. The importance attributed to probate courts is to be observed by comparing the term of office of probate judges with that of judges of courts of general jurisdiction.[360] If the term is less, the office is less likely to attract the

REV. 446 (1935); "Report of the Cincinnati Conference on the Selection and Tenure of Judges in Ohio," 8 UNIV. CIN. L. REV. 359 (1934); Freightner, "Judicial Selection and Tenure," 15 IND. L. J. 215 (1940); Wood, "Judicial Selection and Tenure," 9 ROCKY MT. L. REV. 197 (1937); Swancara, "Short Terms as Debilitators of the American Judiciary," 11 ROCKY MT. L. REV. 217 (1939); Daniels, "Selection and Tenure of Judges," 8 DUKE B. A. J. 1 (1940); Hyde, "Selection and Tenure of Judges," 27 A.B.A.J. 763 (1941).

[358] New York County Law, § 230.

[359] U. S. Const., art. 3, § 1 (the United States district judges for the District of Columbia serve as probate judges there; D. C. Code (1940) § 11-501); Mass. Const., c. 3, art. 1; N. H. Const., arts., 73, 78 (not beyond age 70).

[360] The following table will indicate the tenure of each office:

	Probate Judge	Trial Judge
Alabama	6	6
Arkansas	6 (chancery judge)	4
Colorado	4	6
Connecticut	2	8
Delaware	4 (register)	12
Florida	4	6
Georgia	4	4
Idaho	2	4
Illinois	4	6
Kansas	2	4
Kentucky	4	6
Maine	4	7
Maryland	15	15
Massachusetts	Life	Life
Michigan	4	6
Minnesota	4	6
Mississippi	4 (chancery judge)	4
Missouri	4	6

same calibre of talent than the latter office. In about one-third of the states the terms of both offices are the same. In Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri and Ohio the four year term for probate judges and a six year term for circuit or district judges is provided. In Idaho, Kansas, Oklahoma, South Dakota and Texas two and four year terms respectively are provided; in New Mexico and North Dakota two and six years; in Maine four and seven years; in Tennessee one and eight years; in North Carolina four and eight years; in West Virginia six and eight years. In Connecticut probate judges are elected for two year terms, whereas general trial judges are appointed for life.

(d) *Salary.* The variations in salaries of probate judges reflect both a variation in monetary values in different localities and the importance attached to the office locally. The question of salary, like the question of tenure, is in large measure determinative of the kind of person who will seek the office.

Much variation is to be found in the prevailing practices for compensating probate judges. Some are expected to be content with fees. Some must turn over to the county or state all fees in excess of a designated amount. In either case the net amount of compensation re-

	Probate Judge	Trial Judge
Nebraska	4	4
New Hampshire	Life	Life
New Jersey	5 (surrogate)	5
	5 (orphans' court judge)	5
New Mexico	2	6
New York	6 (14 in New York City)	14
North Carolina	4 (clerk)	8
North Dakota	2	6
Ohio	4	6
Oklahoma	2	4
Oregon	6	6
Pennsylvania	4 (register or wills)	10
Rhode Island	?	Life
South Carolina	4	4
South Dakota	2	4
Tennessee	1	8
Texas	2	4
Vermont	2	2
Virginia	8 (clerk)	8
West Virginia	6	8
Wisconsin	6	6

In Arizona, California, Indiana, Iowa, Louisiana, Montana, Nevada, Utah and Wyoming, there is identity of judges of the two courts and hence of their terms of office. Where life tenure is indicated, good behavior is implied and retirement at age seventy is sometimes provided.

ceived by a probate judge will depend on the amount of business in his jurisdiction, which in turn depends on the population and wealth. Some states have a fixed salary for probate judges throughout the state; others have adopted a variable scale depending upon the county (presumably based upon population) or upon the population of the county directly. In a few instances the amount of salaries is left to local boards;[361] or the amount of salary provided by statute may be supplemented locally where warranted by the volume of business and the population.[362] In certain places additional compensation is paid for additional services, such as acting as juvenile judge,[363] or in connection with inheritance tax appraisements.[364]

As in the case of tenure of office, the amount of compensation in each case is to be compared with that received by the judges of the courts of general jurisdiction.[365] In most cases the two salaries are

[361] Ky. Rev. Stat. (1942) § 25.250; N. C. Gen. Stat. Ann. (Michie, 1943) §§ 28-171, 3903; Wis. Stat. (1943) § 59.15.

[362] Ind. Stat. Ann. (Burns, 1933) § 4-3201 through 3219; R. I. Gen. Laws Ann. (1938) c. 574, §§ 3, 5.

[363] Mich. Stat. Ann. (1943) § 27.3178 (4).

[364] Mo. Rev. Stat. Ann. (1942) § 580; Ohio Gen. Code Ann. (Page, 1937) § 5348-10a.

[365] The following table will serve as a basis for comparison:

	Probate Judge	Trial Judge
Alabama	Fees*	$5000–8000
Arkansas	$3600	3600
Colorado	1200–7000	5000
Connecticut	Fees	12000
Delaware	1500–4000 (register)	10000–10500
Florida	Fees	5000*
Georgia	Fees	5000
Idaho	800–2000	4000
Illinois	5000 (23000 in Cook County)	8000 (23000 in Cook County)
Kansas	600–4000	4000
Kentucky	Fees or reasonable salary	3000
Maine	600–4000	7500
Maryland	4–15 per day	8500–11500
Massachusetts	3000–11000	12000–13000
Michigan	1000–8400	7000
Minnesota	750–7500	6000
Mississippi	5000	5000
Missouri	Fees	2000–5500*
Nebraska	800–4500	5000
New Hampshire	1500–2500	7000
New Jersey	4000–8000 (surrogate)	2700–15000
New Mexico	300–800	4500
New York	1800–15000	15000

*Indicates that the compensation indicated may be supplemented locally.

subject to noticeable differences, the amount paid to probate judges being the lesser of the two. In the states where the unified court system prevails, there is identity of judges and consequently of salaries. This applies also to the judges of the orphans' courts of Delaware, New Jersey and certain counties of Pennsylvania in which the common pleas judges also preside over the orphans' courts. Only in Pennsylvania do the judges of the orphans' courts (where separate from the common pleas courts) receive the same compensation as do common pleas judges. Here the salary scale varies between $9,000 and $14,000, depending upon the county.[366] In New York City and Chicago the salary of probate judges has been made to correspond to that of trial judges.[367]

B. *Other Personnel*

As in courts of general jurisdiction, a clerk is a part of every probate court organization. Invariably the duties of the clerk are "clerical," i.e., to keep the records of the court proceedings and to receive and file petitions and other papers that are deposited in the court. In a few states clerks are empowered to issue orders for hearings before the

	Probate Judge (23000 in N. Y. City)	Trial Judge (23000 in N. Y. City)
North Carolina	Fees or salary	6500
North Dakota	1500–2700	4000
Ohio	1100–10000	3000*
Oklahoma	1500–5000	4000–7200
Oregon	500–3000	5000–6500
Pennsylvania	9000–14000	9000–14000
Rhode Island	Fees or salary	9500–10000
South Carolina	Fees or salary	6750
South Dakota	700–3800	2500
Tennessee	5 per day*	5000
Texas	Fees or salary	5000–7500*
Vermont	600–2100	5000
Virginia		5400
West Virginia	2 per day	5000–7500*
Wisconsin	Fixed by county board	8000*

* Indicates that the compensation indicated may be supplemented locally.

The authors are advised that in Missouri the statutes providing for salaries of probate judges in certain counties are regarded as unconstitutional; instead the fees of office, up to the amount paid to circuit judges, are retained.

In Arizona, California, Indiana, Iowa, Louisiana, Montana, Nevada, Utah and Wyoming, there is identity of judges for the two courts and hence of their salaries.

[366] Pa. Stat. Ann. (Purdon, 1930) tit. 17, §§ 834, 836. It is not to be implied from this statement that all receive the same salary, but only that, county for county, orphans' court judges receive the same as do common pleas judges in that county.

[367] N. Y. Jud. Law, art. 5, §§ 142, 143; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, § 320; c. 53, § 22.

court, appoint appraisers to make inventories, approve bonds, etc. Even these are hardly more than ministerial duties. It is but another step to empower the clerk to probate wills and grant letters in cases where there is no dispute as to the validity of the will or any contest as to who is entitled to letters. In most instances these are regarded as routine functions which any efficient and trustworthy clerk can perform. They are the substantial equivalent of those performed by the registrars in the English ecclesiastical courts. Where statutes have invested clerks of probate with powers of this kind, the judge is free to handle the more important matters of probate administration.

A study of the various statutes reveals that clerks have been given powers varying all the way from those of a clerical nature to complete judicial powers corresponding to those possessed by the judge. Under the recent Florida code the clerk may perform "all non-judicial functions which the judge may perform."[368] The Kansas code makes the probate judge the clerk of the probate court and authorizes the appointment of assistants as deputy clerks.[369] Statutes of every state either provide for or contemplate the performance of clerical duties in keeping the court records and files. Some authorize the clerk to issue notices or citations for hearings before the court.[370] Others provide for the approval or fixing the amount and approval of bonds of personal representatives,[371] appointing appraisers for the inventory,[372] supervising the

[368] Fla. Stat. Ann. (1941) § 36.04.

[369] Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-202. Such a statute fixes upon the probate judge the primary responsibility for keeping the records of the probate court, but permits assistants to accomplish this objective. It also makes it possible in a sparsely settled county for the judge to be his own clerk where the amount of business does not warrant the employment of a deputy clerk.

[370] Ariz. Code Ann. (1939) § 38-2005; Cal. Prob. Code (Deering, 1941) § 1207; Conn. Gen. Stat. (1930) § 4783; Idaho Code Ann. (1932) § 15-1505; Mass. Ann. Laws (Michie, 1932) c. 217, § 21; Mich. Stat. Ann. (1943) § 27.3178 (12); Minn. Stat. (1941) § 525.095 (when authorized by court); Miss. Code Ann. (1942) § 1248; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) §§ 10360, 10376; Neb. Comp. Stat. Ann. (Dorsey, 1929) § 27-544; N. J. Rev. Stat. (1937) §§ 2:31-37, 3:2-22; N. Y. Surrogates' Court Act, § 32; N. C. Gen. Stat. Ann. (Michie, 1943) § 2-16; Tex. Civ. Stat. Ann. (Vernon, 1925) §§ 3306, 3333; Utah Code Ann. (1943) §§ 102-2-1, 102-14-10; Wis. Stat. (1943) § 253.27 (in judge's absence); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 88-904.

[371] Ala. Code Ann. (1940) tit. 13, § 300; Del. Rev. Code (1935) § 3813; Ind. Stat. Ann. (Burns, 1933) § 6-501; Iowa Code (Reichmann, 1939) § 11832; Miss. Code Ann. (1942) § 1249 (order new bonds); Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10376 (in absence of judge from county, but subject to setting aside or modification by judge within thirty days); Utah Code Ann. (1943) § 102-2-1; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 88-1503.

[372] Mass. Ann. Laws (Michie, 1932) c. 217, § 22; Miss. Code Ann. (1942)

inventory,[373] or making orders as to personal property.[374] Of a slightly higher order are powers to hear and pass upon claims against the estate,[375] to make decrees barring creditors,[376] to audit accounts,[377] and to grant discharges to personal representatives.[378]

Under the English system, as we have seen, there was a division of function between the ecclesiastical courts and chancery in the administration of decedents' estates. The power to probate wills and grant letters, exercised by the ecclesiastical courts,[379] was essentially judicial in character even though no question was raised or contest involved. Vestiges of this dual organization exist in this country today in Delaware, the District of Columbia and Pennsylvania where separate offices of registers of wills are maintained, leaving the major task of administering estates to the orphans' or probate court.[380] Essentially this same system prevails in Mississippi[381] and Virginia[382] where such functions are performed by the clerk of the court instead of by a register presiding over the separate register's court. In effect the register of wills or clerk has supplanted the ecclesiastical courts in performing this function. This practice of having a judicial function performed by a ministerial officer is thus justified by history as well as by modern

§ 1248; Utah Code Ann. (1943) § 102-2-1; Va. Code Ann. (Michie, 1942) § 5249; W. Va. Code Ann. (Michie, 1937) § 4273.

[373] Del. Rev. Code (1935) §§ 3828-3842; N. J. Rev. Stat. (1937) § 3:9.

[374] Iowa Code (Reichmann, 1939) § 11832; N. C. Gen. Stat. (Michie, 1943) §§ 28-73 to 28-80; Utah Code Ann. (1943) § 102-2-1 (perishable property).

[375] D. C. Code (1940) § 19-403; Md. Ann. Code (Flack, 1939)art. 93, § 282; Miss. Code Ann. (1942) § 1248; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10376 (in absence of judge and when not contested, but subject to setting aside or modification by judge within thirty days).

[376] N. J. Rev. Stat. (1937) § 3:25-9.

[377] Ala. Code Ann. (1940) tit. 13, § 300; Del. Rev. Code (1935) § 3844; Iowa Code (Reichmann, 1939) § 11832 (intermediate accounting); Me. Rev. Stat. (1930) c. 75, § 23; Miss. Code Ann. (1942) § 1249 (during vacation but subject to approval or disapproval by court); Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10376 (intermediate accounting, in absence of judge, but subject to setting aside or modification by judge within thirty days); N. C. Gen. Stat. Ann. (Michie, 1943) §§ 2-16, 28-162; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 1861.

[378] N. C. Gen. Stat. Ann. (Michie, 1943) § 28-162; Del. Rev. Code (1935) § 3866.

[379] See discussion under I-A supra.

[380] See discussion under III-A-1 supra. Del. Rev. Code (1935) §§ 3799-3876; D. C. Code (1940) § 19-403; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 1981. In Pennsylvania, however, in case of a contest, the register of wills may send, or the orphans' court may order him to send, the matter to the latter court for hearing.

[381] Miss. Code Ann. (1942) §§ 1248, 1249.

[382] Va. Const., art. 6, § 101; Va. Code Ann. (Michie, 1942) §§ 5247, 5249.

convenience. In the states above mentioned this power is lodged in the register or clerk, whether or not there is a contest or dispute as to the matter. Other states have been willing to entrust this function to the surrogate or clerk provided that no contest or dispute is involved. This practice prevails in New Jersey,[383] Alabama,[384] Iowa[385] and North Carolina,[386] and the clerk of the superior court in North Carolina is himself a court.[387] In Delaware the deputy register of wills may exercise this power in such circumstances,[388] whereas the register may do so irrespective of a contest.

In Maryland the register of wills exercises these prerogatives during vacation of the orphans' court.[389] In Arkansas,[390] Indiana,[391] Missouri[392] and West Virginia[393] the clerk proceeds similarly during vacation, but subject to a subsequent confirmation or rejection by the court. In Montana, during any absence of the judge, whether during term time or not, the clerk possesses this power when there is no contest.[394]

In Mississippi[395] and Utah[396] the clerk may appoint special or temporary administrators, and in North Carolina[397] may revoke letters already granted. The register of wills in Pennsylvania[398] at any time, and the clerk in Mississippi[399] during vacation subject to the subsequent approval of the court, may do likewise.

This vesting in the clerk of judicial powers in probate does not stop here. In Missouri the clerk may exercise almost complete judicial power during vacation, subject to a subsequent confirmation or rejection

[383] N. J. Rev. Stat. (1937) §§ 3:2-22; 3:7-5.1.
[384] Ala. Code Ann. (1940) tit. 13, § 300.
[385] Iowa Code (Reichmann, 1939) § 11832.
[386] N. C. Gen. Stat. Ann. (Michie, 1943) § 28-30.
[387] Edwards v. Cobb, 95 N. C. 4 (1886).
[388] Del. Rev. Code (1935) § 3803.
[389] Md. Ann. Code (Flack, 1939) art. 93, § 283.
[390] Ark. Dig. Stat. (Pope, 1937) § 4.
[391] Ind. Stat. Ann. (Burns, 1933) § 6-102.
[392] Mo. Rev. Stat. Ann. (1942) §§ 1, 2440.
[393] W. Va. Code Ann. (Michie, 1937) §§ 4273, 4274.
[394] Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10376.
[395] Miss. Code Ann. (1942) § 1248.
[396] Utah Code Ann. (1943) § 102-2-1.
[397] N. C. Gen. Stat. Ann. (Michie, 1943) § 2-16.
[398] Pa. Stat. Ann. (Purdon, 1938) tit. 20, § 1863 (when granted to wrong person or on probate of after-discovered will).
[399] Miss. Code Ann. (1942) §§ 1249, 1251.

by the court.[400] In Alabama[401] and North Carolina[402] the clerk has such power at all times in the absence of contest. This means that all matters in these two states which are noncontentious in fact may be supervised by the clerk. In Delaware the register of wills regularly supervises the administration of decedents' estates except for the sale of real estate.[403] And in certain counties of South Carolina the judge may confer complete judicial power upon the clerk.[404]

One further aspect of this lodgment of power in the clerk should be mentioned. Where there is a vacancy in the office of judge provision is made in New Mexico[405] and South Carolina[406] for the clerk to act as judge pro tem during such vacancy. In one respect this practice offends every principle previously advocated on the question of judicial qualifications. As an emergency measure, it may be justified on the basis that the clerk is the one person who is likely to be familiar with the affairs of the court and would likely be capable of functioning temporarily until a successor is selected and qualified.

Thus we witness all gradations of power lodged in some inferior officer under a wide variety of circumstances. Each represents an attempt to facilitate the administration of the work of the probate court. Some may seem to vest too much power in such officer. A critical analysis should be accompanied by an examination as to how the system works in a particular locality. The qualifications and abilities of the clerk will be relevant in any individual case. Professor Atkinson points out that even routine matters may be so seriously mishandled as to cause serious consequences.[407] The right of appeal or possibility of correction by the judge is no more than a partial justification. A more fundamental solution in connection with every grant or substitution of power would be a requirement of higher qualifications on the part of the officer who is invested with the power and who will act in the first instance. Whether there is a separate judge for each county, or but one judge for several counties, the judge should assume the primary responsibility for every judicial act. If the clerk is empowered to act,

[400] Mo. Rev. Stat. Ann. (1942) § 2440.
[401] Ala. Code Ann. (1940) tit. 13, § 300.
[402] N. C. Gen. Stat. Ann. (Michie, 1943) § 2-16.
[403] Del. Rev. Code (1940) cc. 98, 99.
[404] S. C. Code Ann. (1942) § 206.
[405] N. M. Stat. Ann. (1941) § 16-415.
[406] S. C. Code Ann. (1942) § 3642.
[407] Atkinson, "Organization of Probate Courts and Qualifications of Probate Judges," 23 J. AM. JUD. SOC. 93 at 96 (1939).

either in contentious or noncontentious matters, it seems desirable that his acts should be subject to the subsequent approval or disapproval of the judge.

VIII

STANDARDS FOR AN IDEAL PROBATE COURT

By way of conclusion, we shall propose an answer to the question: What are the standards for an ideal probate court? It is readily conceded that, in any legal study covering so vast an area, the conclusions of the authors cannot be wholly objective. Necessarily, they are based, not only on the legal and factual data heretofore presented, but also on the individual background and experience of the respective writers. Nevertheless, it is believed that each conclusion hereinafter presented finds ample support in the materials discussed in the preceding pages.

The standards for an ideal probate court will be considered from three standpoints: first, the place of the court in the judicial organization; second, the subject matter of the jurisdiction of the court; and third, the personnel of the court.

First, the probate court should be given a place in the judicial organization fully coordinate with the trial court of general jurisdiction. Historically, that has been the course of development in England; and that is the trend in the United States. The nature of the business of the probate court, the fact that it handles estates unlimited in value and character, and that its jurisdiction may well include the specific administration and distribution of both the real and the personal property of the estate, all point to a conclusion that a superior court is needed. If such a court is set up, then appeals with trial de novo in the court of general jurisdiction would necessarily be eliminated. The only appeals would be to the appellate courts to which appeals are made in actions at law and suits in equity.

Second, the probate court should be the same court as the court of general jurisdiction or should be a division of it. This does not mean merely a unification of judges, such, for example, as is the plan in certain counties in Ohio and Pennsylvania. It means a unification of *courts*. Indeed, this unification should be so complete that, if, after a proceeding is begun, it is found to come under the equity or common-law jurisdiction of the court, it can be transferred to another docket of the court or to another division, without beginning the proceeding anew. Only in this way can be completely avoided the hardships incident to determining where the shadowy, marginal line of probate jurisdic-

tion is to be drawn. The question of whether a given matter should be in equity or in probate will cease to be one in which a slight misstep on the part of the attorney may prejudice an innocent litigant. Such a judicial organization is advocated by Dean Roscoe Pound in his recent book on *Organization of Courts*. In presenting the principles and outline for a modern court organization he suggests that there be three chief branches, a court of appeal, a superior court and a county court branch. Discussing the second of these, he says:[408]

> "The second branch, the Superior Court, should be given complete jurisdiction of first instance, civil and criminal, the civil jurisdiction, for reasons set forth in preceding chapters, to include law, equity, and probate. Certainly there should be no mandatory setting off of these types of cases to separate divisions. But the organization of this branch should be so flexible that if experience showed good reason for setting off some or all of them in that way, it could be done by rule of court, or more simply by assigning cases to judges in such a way as to effect a practical segregation, which, however, could be changed or revoked later if experience or changed conditions made such action advisable."

This type of judicial organization can be adapted to operate both in metropolitan areas and in rural districts. Without doubt, in large cities there will be a number of judges selected for the trial courts of general jurisdiction. Statutory provisions should set up some sort of judicial council, or other administrative machinery, whereby these judges can be assigned to particular specialized matters. Just as some may be assigned solely to criminal matters or to domestic relations cases, so others should be assigned to the probate work of the court. This is in fact done in certain metropolitan areas in California.[409] But the writers would advocate going even a step farther than does the California system. In that state, the superior court, when it hears a probate matter, is the "superior court sitting in probate." While it is not another court, still its jurisdiction is so different that a proceeding cannot ordinarily be transferred from its probate to its civil jurisdiction, but would have to be started anew. The probate jurisdiction of the trial courts in the state of Washington is to be preferred in this particular. In that state, as has been seen, there is not a court "sitting in

[408] POUND, ORGANIZATION OF COURTS 281 (1940).

[409] Cal. Code Civ. Proc. (Deering, 1941) §§ 67, 67a; Rules of Superior Court of California (as amended to July 1, 1943), rules 24 and 25, LARMAC, CONSOLIDATED INDEX TO CONSTITUTION AND LAWS OF CALIFORNIA, 1788-1791 (1943).

probate." It is all a part of the same jurisdiction whether the subject matter be civil or probate.

In rural areas of sparse population objection may well be raised to a separate judge of probate if he is to have the same qualifications and salary as the judge of the trial court of general jurisdiction. It may be felt that the small amount of probate business does not justify such an expensive court. But when the probate jurisdiction is added to that of the civil and criminal jurisdiction of the trial court, not only is this objection eliminated, but the advantages of a unified court are also obtained.

If the objection is made that in many states the unit for the trial court is a district which may include several counties and that the emergency character of some kinds of probate business may well require a judge in each county, the answer is that the trial judge may be assigned to a circuit which includes a number of counties; but clerks may be elected or appointed in each county to take care of routine business under the supervision of the judge, and, of course, the court can sit in each county.[410] This is, in fact, the system adopted in Montana and in some other states.

What should be included in the subject matter of the jurisdiction of the ideal probate court? Certainly if we have the unified court, then this question becomes less important. If it is the same judge or a division of the same court, it becomes much less important whether he is sitting in equity or in probate as to the particular question before him. Nevertheless, in the interests of efficiency and simplicity of administration, it would seem that all matters directly connected with the administration of the decedent's estate should be within the probate division of the court. Such has been the definite trend of legislation in the United States even where probate courts are entirely separate from the trial courts of general jurisdiction. And it is believed that that trend is sound. In that particular the English judicial system might profit by imitating some American models.

As to matters other than decedents' estates, it is clear that the

[410] It may be added that, not only should there be a clerk in each county, but the court should be open for business at all reasonable times. The tendency of modern legislation is to dispense with terms of court for probate business. See Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-211: "There shall be no terms of the probate court. It shall be open for the transaction of business at the county seat at all reasonable hours. Hearings may be had at such other places in the county as the court may deem advisable."

probate jurisdiction should include guardianships and matters closely related, such as adoptions. But this jurisdiction should not be weighted down with all sorts of irrelevant administrative matters, such as are sometimes assigned to county courts which sit in probate matters.

Third, what can be said as to the personnel of the court? Obviously, if the judge is a judicial officer of the trial court of general jurisdiction, he should have, and will have, the same qualifications as that judge, with a corresponding tenure and salary. But even if that were not the case, the nature of probate jurisdiction calls for such qualifications. He should be a member of the bar, preferably with experience in practice or on the bench.

As to other officers of the court, such as clerks or registers, there should be an adequate number of well qualified persons. Should they have judicial powers? Considering the various patterns in the statutes heretofore analyzed, we find three possible answers. First, in some states such officers do have judicial powers; in other words, for some purposes, they function as courts. Second, in other states, they have no judicial powers whatever, but can perform only ministerial acts. In still a third group of states, the clerk or register acts in certain matters either subject to the subsequent approval of the judge or subject to the lack of disapproval of the judge within a specified period.

It would seem that, if, as is herein advocated, a noncontentious, summary procedure is permitted, efficiency would require that some judicial powers be given to the clerk or register in these matters. However, the judge should be held to strict accountability for these acts. The jurisdiction described in the third group of states is believed to be preferable. But it should be limited to noncontentious matters. If the judge disapproves of the act of the clerk, or if the matter is contentious, then it should come before the judge in person.

That these conclusions follow as a matter of course from the legal and factual data herein presented can scarcely be denied. That they have seldom been reached by legislative bodies in America is believed to be due, not to the uncertainty of the conclusions, but to the fact that, until very recently, the realm of probate law has been one outside the sphere of scholarly investigation or legislative reform.[411] And

[411] A recent example of a scientific and comprehensive legislative approach to probate reform is found in New Jersey. At its 1944 session the New Jersey legislature agreed upon a revised constitution for that state which is to be submitted to the people at the general election this year. The proposed constitution provides for a superior court having complete general original jurisdiction in all cases, and divided into two sections: (1) a law section to exercise civil and criminal jurisdiction at law, and matri-

this legal structure for more than a century has been added to or amended, bit by bit, to accomplish the specific, narrow objectives of particular legislators or of a few of their constituency, without any consideration of the historical development or of the proper functions of probate courts and probate legislation as a whole. If these pages have contributed something toward a broad and comprehensive view of the problems of probate court organization they will not have been written in vain.

monial jurisdiction in certain cases; and (2) an equity and probate section to exercise all other jurisdiction. Further provision is made that either section shall exercise the jurisdiction of the other when the ends of justice so require. Proposed N. J. Rev. Const. (1944) art. 5, § 3, pars. 2-3.